IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 145 OF 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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SABBIRALI ALIHUSEIN VORA & ANR. - Appellant(s)
Versus
KIKABHAI MOHMEDALI & ORS. - Respondent(s)

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Appearance :
MR. HARIN P. RAVAL for Appellant(s) : 1 - 2.
Respondent No. 1 -4 and 6 deleted.
NONE for Respondent(s) : 5.
MR. UDAY BHATT, AGP for Respondent(s) : 7.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 07/09/2006

ORAL JUDGMENT

1. Mr. Harin P. Raval, learned Counsel for the appellants, and Mr.Uday Bhatt, learned Counsel for the respondent-State, are heard.

I am told that the original plaintiff Nos.1, 3, 4 and 6 had already expired during the pendency of the First Appeal and other respondent, except respondent No.5, has also died. Respondent No.5 is served, but, there is no representation on his behalf.

2. The facts necessary for disposal of the present appeal are that on 17th July, 1944, an application was made by Mohammedan Industrial Society to the erstwhile State of Palanpur for sale of certain land; on 2nd August, 1945, *vide* Order No.1118, the erstwhile State of Palanpur issued orders in favour of the Society and ultimately, executed a Sale Deed in favour of the said Society for various Survey Numbers. The order contained a condition that constructions would be completed within a period of fifteen years from the date of respective orders. On 15th April, 1948, yet another application was made by the Society to the State of Palanpur that the condition relating to construction within the period of fifteen years be deleted. *Vide* Order No. 1474 dated 15th April, 1948 and permanent *Parvana* No.43, the said lands were sold by the erstwhile State for an amount of Rs.50,001/-, the total land was 41 Acres and 10 Gunthas. On 15th May, 1948, *vide Parvana* No.58, 4 Acres, 29 Gunthas of land was granted to Mohammedan Industrial Society for construction

of bungalows with garden. The Society, it appears, had leased out some land in favour of its other members for the purpose of agricultural operations. The possession of the property continued with Mohammedan Industrial Society upto 19th January, 1961, after coming into effect the Government of Gujarat, the Collector, Banaskantha passed an order directing forfeiture of 32 Acres and 22 Gunthas and 16 square metres of land sold by the erstwhile State of Palanpur. On 21st January, 1965, an appeal was preferred, the same was rejected on the ground that the post of Commissioner of Appeals was abolished. Facing dismissal, Mohammedan Industrial Society approached the Revenue Department, State of Gujarat on 8th July, 1967 with an application to make modifications in the order; the application was granted and it was directed that construction should be completed within two years, failing which the land would stand forfeited. On 19th November, 1967, the Collector, Banaskantha imposed various conditions in his order, including the condition to complete the construction within a period of two years. Addition of the additional condition was challenged by Mohammedan Industrial Society and thereafter, by an Order dated 13th February, 1968, the State Government set aside the order passed by the Collector and asked him to incorporate only those

conditions, which were contained in the order of sale of the land by the erstwhile State. Accordingly, *vide* Order dated 11th June, 1968, the Collector incorporated the said conditions in his order. Thereafter, the Society made an application for relaxation of certain conditions, which came to be rejected and thereafter, the revision against the said order was also dismissed. On 17th September, 1976, a show cause notice came to be issued by the Collector, asking Mohammedan Industrial Society to show cause that why the land be not forfeited in view of non-compliance of Condition No.2. On 12th October, 1977, the Collector, observing that there was breach of Condition No.2, directed forfeiture of the property; the revision application against the said order came to be rejected, therefore, the plaintiffs issued, somewhere in the year September-1978, a notice under Section-80 of the Code of Civil Procedure and thereafter, filed the suit.

2.1 The aforesaid suit was dismissed on 5th November, 1976. The original plaintiffs challenged the said judgement and decree by filing Civil Appeal No.35 of 1989. During pendency of the said appeal, the present appellants made an application for their joinder as parties as their rights were to be adversely affected; the said application was allowed; the present appellants

were ordered to be joined as respondents.

2.2 The learned first Appellate Court, after hearing the parties, allowed the appeal and remanded the matter back to the learned trial Court with certain directions.

2.3 After the remand, the present appellants became the defendants; they filed their written statement and also filed their counter-claim under Order-VIII, Rule-6 of the Code of Civil Procedure. In their counter-claim, they had stated that they were in possession of the property for long so many years and they had acquired certain rights and in any case, they could not be evicted from the property. It is to be noted that the plaintiffs' did not file any written statement to the counter claim submitted by the newly added defendants and the State also did not take any objection to the counter claim either by filing additional written statement or by amending the written statement which was already filed by the State.

2.4 Additional issues were cast and the present appellants were granted permission to lead further evidence. Additional evidence in form of the order passed

by the Deputy Collector in R.T.S. Appeal No.72 of 1977, was produced, other evidence was also brought on record. After hearing the parties, the learned trial Court dismissed the suit filed by the plaintiffs, but, however, decided Issue Nos.2C and 2D in favour of the present appellants, holding that they were in long peaceful possession of the property and as such, the State was not entitled to dispossess them except in accordance with law or by taking some proceedings which were known to law.

2.5 The plaintiffs, being aggrieved by the dismissal of the suit, filed Regular Civil Appeal No.11 of 1997 against the said judgement and decree dated 5th November, 1996. The State also feeling aggrieved challenged the said judgement and decree, but, as its appeal was barred by limitation, they preferred an application under Section-5 of the Limitation Act, 1963 for condonation of delay and extension of time. The said application was registered as Civil Miscellaneous Application No.11 of 1997. The application filed by the State Government was rejected on 17th February, 1998, the delay was not condoned and consequently, the appeal stood dismissed. Undisputedly, the said rejection was not challenged by the State Government before the High Court in any competent proceedings or by filing a review before

the very same Court. The State felt content and allowed the matter to rest there.

2.6 So far as the case of the present appellants was concerned, in the appeal filed by the original plaintiffs, the State Government made an application for transposition, but, on 17th September, 2003, the application for transposition was withdrawn and it, accordingly, stood disposed of. On 23rd September, 2004, yet another application for transposition, which was earlier filed, was withdrawn and it came to be rejected as premature and vexatious. The State Government, still being dissatisfied, did not stop in its endeavour and made another application under Order-XXIII, Rule-1 of the Code of Civil Procedure for its transposition from the array of defendants to the array of appellants. The application came to be rejected on 2nd April, 2005. These rejection orders were not challenged by the State Government before any appropriate forum in accordance with law.

2.7 At this moment, I must observe that the applications filed by the State Government were absolutely misconceived and ill advised. The State Government was the defendant, against which the original

plaintiffs were seeking some relief and in the appeal filed by the plaintiffs, the State Government wanted to join the plaintiffs as co-plaintiff. It is unheard of that in the appeal filed by the plaintiff, a defendant, against whom a decree is required, can be transposed as a co-plaintiff. The ground of such application for transposition of the defendant-State as appellant would not only have created problems, but, would have created a situation of an impossibility. The two sets of appellants on one side would have been fighting against each other and the State would be fighting against the present appellants, while the original appellant was not seeking any decree against them. Before the learned first Appellate Court, applications were filed that the original appellant Nos.1, 3, 4 and 6 were dead, the Appellate Court recorded the facts and proceeded to hear the matter on merits.

2.8 After hearing the parties, the learned first Appellate Court, *vide* its judgement and decree dated 30th June, 2005, rejected the plaintiffs' appeal, but, simultaneously set aside the decree granted in favour of the present appellants. Setting aside of the decree, which was granted in favour of the present appellants, was, in fact, an act in favour of the respondent-State,

which had failed in challenging the decree right in time or whose efforts failed every time for its transposition from the array of respondents to the array of appellants.

2.9 The appellants being aggrieved by the said judgement and decree passed by the first Appellate Court, interfering with the decree granted in their favour by the trial Court, are before this Court with the submission that the procedure adopted by the learned first Appellate Court is not known to law, is perverse and defies all the procedural laws.

3. The appeal came to be admitted on 13th September, 2005 on the following substantial questions of law:

(i) Whether plea of the State as urged and upheld by the District Court is barred by the principles of res-judicata and constructive res-judicata in view of the appeal of the State against the judgment and decree of the trial Court having been dismissed as time barred by judgment and order dated 27.10.1998 ?

(ii) Whether in view of consistent rejection of application for transposition of the State as appellant and in view of dismissal of the appeal of the State as being time barred, can state be granted relief in an appeal in which they had not filed cross

objections and which was fled by the original plaintiffs limited against rejection of their prayer for decrees, more particularly without the interest of the original plaintiffs was not adverse to the plaintiffs ?

(iii) Whether merely on account of non-payment of court fees, which the Court can direct to be paid at any time, does an appeal rendered upholding the counter claim become a nullity and liable to be set aside ?

(iv) Whether District Court was right in setting aside the decree in favour of the appellants, though same was not challenged by the original plaintiff and though same could not be challenged on the ground of res-judicata and constructive res-judicata in view of dismissal of the said appeal as being time barred and in view of consistent rejection of the State's application for transposition of State as appellant ?

(v) Whether in view of the Deputy Collector's order holding the appellants to be in occupation, possession and cultivation of the land having become final, can the State without challenging the said order challenge the decree in favour of the appellants ?

Though five questions have been framed at the time of admission, but, sum and substance of the

questions is that whether dismissal of the State Government's appeal would operate as *res judicata* and whether the decree granted in favour of the present appellants (defendants) could be set aside in a case where the original plaintiffs were not seeking any relief against these defendants in the appeal filed by the plaintiffs.

4. Order-XLI, read with Section-96, of the Code of Civil Procedure provides a right in favour of the plaintiff if he is dissatisfied by dismissal of the suit or rejection of part of reliefs. It further provides a right in favour of the defendant if he is aggrieved by the grant of decree or part decree. An appeal shall lie in accordance with law to the first Appellate Court on the grounds which were available to the parties under the law. If an appeal is not filed within the period of limitation, then, the period of limitation can be extended beyond the original period of limitation if the Appellate Court records a finding that the appellant before it was prevented by sufficient cause from filing an appeal within limitation. In case after hearing the parties, the Court accepts the application, then, the appeal would be deemed to be within limitation and then, the Court shall proceed to hear the appellant on the

question of admission and for summoning the records and if that is so done and the appeal is admitted for hearing, it shall hear the parties on merits. The first Appellate Court in its jurisdiction would be entitled to consider the questions of facts and questions of law also.

5. In a given case, if the application filed under Section-5 of the Limitation Act is rejected, then, the appeal would be deemed to be a bad appeal as if no appeal has been filed. When such an order is passed against the interest of such appellant, then, he is required to challenge the said order before an appropriate forum, which is the High Court either by way of a revision or by way of proceedings under Article-227 of the Constitution of India. If the order is not challenged before the appropriate forum and the State Government in this case or any appellant in any case, if feels content with the dismissal of the application filed under Section-5 of the Limitation Act, then, that would be an end of the matter for the said appellant and it would always be held that the decree passed by the trial Court in favour of such person against the interest of the State Government has attained finality and has become impeccable.

6. In the present matter, the State Government, after dismissal of its application seeking condonation of delay and extension of time, did not challenge the order before the High Court. It felt content and satisfied.

7. In the appeal filed by the original plaintiffs they did not seek any reliefs against the present appellants, but, sought the reliefs against the State Government to the extent that the State was not entitled to forfeit the land or dispossess them. The original plaintiffs, it appears that, were at all not aggrieved by the decree which the trial Court had granted in favour of the present appellants/defendants.

8. In the appeal filed by the original plaintiffs, the State Government made various applications for their transposition. The applications were rejected one after the other, but, any of the orders was not challenged by the State Government before this Court.

9. Under the circumstances, the State Government was simply a respondent-defendant in the appeal filed by the plaintiffs and they could only oppose the appeal and not any other order passed by the trial Court made in favour of some other defendants. The order passed/decree

granted by the trial Court in favour of the present appellants became final against the interest of the State Government and in the appeal filed by the plaintiffs, the State could not be allowed to challenge the correctness and validity of the decree because they had missed the opportunity to challenge the said decree.

10. The State Government, it appears that, was aggrieved by the decree, which was granted in favour of other defendants, but, unfortunately, was not properly advised to challenge the order dismissing their application filed under Section-5 of the Limitation Act. If the State Government acting through its Officers or the Counsel engaged by it does not act in accordance with law or prudently, then, it has to thank itself and the question, as submitted by Mr.Bhatt, learned Assistant Government Pleader, that public interest is involved in the matter, cannot be raised. If everybody is alive to the public interest, then, the representatives of the public and the people, who were paid from the public exchequer, must rise to the occasion and to the duties assigned to them. In a given case, the Court may become lenient in favour of the State Government, but, in some cases where there is an absolute negligence on the part of the State and its Officers, then, even the High Court

would not be in a position to help them. The State Government, unfortunately, was trapped in a situation from where it could not retrieve. The situation is irreversible. Once the appeal filed by the State Government was dismissed as barred by limitation, then, the Appellate Court could not set aside the decree granted in favour of other defendants, to help and oblige the State Government.

11. Question Nos.1 and 2 framed by the Court must be answered in favour of the appellants-defendants and it must be held that in view of dismissal of the appeal of the State Government, the decree in favour of the defendants in the appeal filed by the third party, could not be set aside. The dismissal of the application filed under Section-5 of the Limitation Act at the instance of the State Government would operate as *res judicata* and would not allow the State Government to challenge the said order in some proceedings which were not instituted by the State Government. The learned first Appellate Court had no jurisdiction to interfere with the decree granted in favour of the present appellants. That part of the judgement and decree passed by the learned first Appellate Court deserves to and is, accordingly, set aside.

12. In view of the aforesaid discussion and answers to Question Nos.1 and 2, it is not necessary to deal with each and every question separately. The appeal is allowed. The appellants shall be entitled to their costs from the State Government. Counsel's fees Rs.2,500/-, payable by the State Government to the appellants. Let a decree be framed accordingly.

[R.S.Garg, J.]

*kamlesh**